Yong Kong Tai (suing as a widow of Loh Keng Yuen, deceased, on behalf of herself and the dependants of the deceased) & Ors v Salim bin Jalal & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-250 OF 1988
ABDUL MALIK ISHAK J
20 DECEMBER 1995

Evidence *— Dying declaration — Admissibility — Whether statement of dying declaration may be given in a summary form — Evidence Act 1950 s 32(1)(a)*

Evidence *— Dying declaration — Oral evidence of — Whether court must assess credibility of the deceased and the witness before relying on dying declaration — Evidence Act 1950 s 32(1)(a)*

Tort *— Negligence — Road accident — Collision between lorry and motor car — Apportionment of liability*

Loh Keng Yuen ('the first deceased') was the driver of a station wagon with two passengers — Lok Park Hong ('the second deceased') and Tho Chin ('the third deceased') — which was involved in a road accident with a motor-lorry driven by the first defendant at or near a bend at 11½ milestone, along the stretch of Jalan Kota Tinggi-Johor Bahru. The plaintiffs were the widows and dependants of the deceased persons and brought this action pursuant to s 7 of the Civil Law Act 1956. There were two conflicting versions of how the accident took place. The plaintiffs' version was based on the dying declaration of the second deceased which was sought to be admitted under s 32(1)(a) of the Evidence Act 1950. The plaintiffs submitted that the second deceased gave a statement before his death while being warded in the hospital to his son ('PW1') to the effect that on their way to Ulu Tiram, a motor-lorry had collided into the station wagon from the rear. The first defendant's version of the accident was that while the motor-lorry was negotiating a left bend at 11½ milestone along the stretch of Jalan Kota Tinggi-Johor Bahru, a station wagon from the opposite direction suddenly skidded in heavy rain across the said road and turned twice as it encroached into the path of the motor-lorry and turned in the direction of Kota Tinggi thereby causing the rear of that station wagon to collide with the front portion of the motor-lorry. The issue before the court was whether the plaintiffs could succeed in their claims against the defendants based on the dying declaration of the second deceased.

Held, dismissing the claims:

(1) In a civil suit for damages for death caused by a road accident due to the negligence of the defendant, the declaration of the passenger killed 'as to the cause of his death' is admissible. In order to qualify as a dying declaration, that statement must first satisfy two conditions.

Firstly, it must relate to either the cause of death or the circumstances of the transaction which resulted in the death. The phrase 'circumstances of the transaction' should not be accorded a wide construction because it would lead to hearsay being too readily admitted. The circumstances must have some proximate relation to the actual occurrence. The transaction must relate to a set of facts pertaining to the death of the victim. Thus, that part of the second deceased's statement relating to the time, place of his death and the cause of his death would satisfy the first condition.

Secondly, the statement must not be in a summary form. The statement must not be summarized by anyone, but must be given word for word as given by that dying person. Verbatim reproduction of the words must be given. In the present case, PW1 did not write down what the second deceased told him about seven to eight years ago and PW1 summarized what was said to him. The summarized version as narrated by PW1 of what the second deceased had told him ran counter to the second condition and consequently, the dying declaration ought not to be received as evidence (see pp 389F–I, 390A, H–I and 391A–C); *Pakala Narayana Swami v King-Emperor* [1939] MLJ 59 and *Toh Lai Heng v R* [1961] MLJ 53 followed.

(2) The dying declaration of the deceased was not made on oath and the declarant was not available for cross-examination. Therefore, the court must assess the credibility of the second deceased and PW1 before relying on the statement made to PW1. On the facts of the case, the court did not find the dying declaration of the second deceased and the evidence of PW1 credible (see p 391E); *Mohamed bin Allapitchay & Ors v R* [1958] MLJ 197 and *Chan Phuat Khoon v PP* [1962] MLJ 127 followed.

(3) On the facts, it would appear that the defendants' version as to what had happened was more probable. The findings of facts raised a presumption of negligence against the driver of the station wagon, namely the first deceased and it was for the plaintiffs to prove affirmatively that they had exercised all reasonable care. On the facts also, it was established that the first defendant was not guilty of contributory negligence (see pp 392I, 393A and 394B–C); *Barkway v South Wales Transport Co Ltd* [1948] 2 All ER 460, *Lim Ah Toh v Ang Yau Chee & Anor* [1969] 2 MLJ 194 followed, *Wong Mun Kong v Pacific & Orient Underwriters (M) Sdn Bhd* [1978] 1 MLJ 183 and *Yee Boon Neng v Tan Chwee* [1967] 2 MLJ 157 distinguished.

[Bahasa Malaysia summary

Loh Keng Yuen ('si mati pertama') adalah pemandu sebuah station wagon dengan dua orang penumpang — Lok Park Hong ('si mati kedua') dan Tho Chin ('si mati ketiga') — yang telah terlibat dalam satu kemalangan jalan raya dengan sebuah lori yang dipandu oleh

defendan pertama di suatu selekoh dekat Batu 11½, di sepanjang Jalan Kota Tinggi-Johor Bahru. Plaintif-plaintif merupakan balu dan tanggungan si mati dan memulakan tindakan ini menurut s 7 Akta Undang-Undang Sivil 1956. Terdapat dua penerangan yang bercanggah berkenaan dengan bagaimana kemalangan itu berlaku. Penerangan plaintif-plaintif adalah berdasarkan akuan nazak si mati kedua yang diminta agar diterima di bawah s 32(1)(a) Akta Keterangan 1950. Plaintif-plaintif berhujah bahawa si mati kedua telah memberi kenyataan sebelum kematiannya semasa berada di hospital kepada anak lelakinya (PW1) bahawa dalam perjalanan mereka ke Ulu Tiram, sebuah lori telah melanggar station wagon itu dari belakang. Penerangan defendan pertama tentang kemalangan tersebut adalah bahawa semasa lori itu sedang membelok selekoh kiri di Batu 11½ di sepanjang Jalan Kota Tinggi-Johor Bahru, sebuah station wagon dari arah yang bertentangan tiba-tiba tergelincir dalam hujan lebat merentangi jalan itu dan berpusing dua kali semasa ia memasuki lorong lori itu dan berpusing ke arah Kota Tinggi dengan itu menyebabkan bahagian belakang station wagon berlanggar dengan bahagian depan lori. Isu di hadapan mahkamah adalah sama ada plaintif-plaintif boleh berjaya dalam tuntutan mereka terhadap defendan-defendan berdasarkan akuan nazak si mati kedua.

Diputuskan, menolak tuntutan:

(1) Dalam guaman sivil untuk ganti rugi atas kematian yang disebabkan oleh kemalangan jalan raya akibat kecuaian defendan, akuan penumpang yang terbunuh 'berkenaan dengan sebab kematiannya' adalah boleh diterima. Tetapi, untuk layak sebagai akuan nazak, kenyataan itu mesti terlebih dahulu memenuhi dua syarat.

Pertama, ia mesti berkaitan dengan sama ada sebab kematian atau keadaan-keadaan transaksi yang menyebabkan kematian. Ungkapan 'keadaan-keadaan transaksi' tidak patut diberi tafsiran yang meluas kerana ia akan menyebabkan dengar cakap boleh diterima dengan mudah. Keadaan-keadaan itu mesti mempunyai perkaitan yang dekat dengan kejadian sebenar. Transaksi itu mesti berkaitan dengan satu set fakta berhubung dengan kematian mangsa. Oleh itu, bahagian kenyataan si mati kedua yang berkaitan dengan masa, tempat kematian dan sebab kematian memenuhi syarat pertama.

Kedua, kenyataan itu tidak boleh berbentuk ringkasan. Kenyataan itu tidak boleh diringkaskan oleh sesiapa, tetapi mesti diberikan secara perkataan demi perkataan seperti yang diberikan oleh orang yang menghadapi kematian. Pengeluaran semula kata demi kata akuan nazak mesti diberikan. Dalam kes ini, PW1 tidak menuliskan apa yang si mati kedua memberitahunya kira-kira tujuh atau lapan tahun dahulu dan PW1 meringkaskan apa yang dikatakan kepadanya. Penerangan ringkas seperti yang diceritakan oleh PW1 tentang apa yang si mati kedua memberitahunya adalah

bertentangan dengan syarat kedua dan ekoran itu, akuan nazak itu tidak patut diterima sebagai bukti (lihat ms 389F–I, 390A, H–I dan 391A–C); *Pakala Narayana Swami v King-Emperor* [1939] MLJ 59 dan *Toh Lai Heng v R* [1961] MLJ 53 diikut.

(2) Akuan nazak si mati tidak dibuat di bawah sumpah dan pengaku tidak ada untuk diperiksa-balas. Oleh itu, mahkamah mesti menguji kebolehpercayaan si mati kedua dan PW1 sebelum bergantung kepada kenyataan yang dibuat kepada PW1. Atas fakta-fakta kes, mahkamah tidak mendapati bahawa akuan nazak si mati kedua dan keterangan PW1 boleh dipercayai (lihat ms 391E); *Mohamed bin Allapitchay & Ors v R* [1958] MLJ 197 dan *Chan Phuat Khoon v PP* [1962] MLJ 127 diikut.

(3) Atas fakta-fakta, nampaknya penerangan defendan-defendan tentang apa yang telah berlaku adalah lebih berkemungkinan. Pendapat fakta-fakta menimbulkan anggapan kecuaian terhadap pemandu station wagon, iaitu si mati pertama dan ia merupakan kewajipan plaintif-plaintif untuk membuktikan secara mengiakan bahawa mereka telah melaksanakan ketelitian yang munasabah sepenuhnya. Atas fakta-fakta ini juga, ia dibuktikan bahawa defendan pertama tidak bersalah atas kecuaian sertaan (lihat ms 392I, 393A dan 394B–C); *Barkway v South Wales Transport Co Ltd* [1948] 2 All ER 460, *Lim Ah Toh v Ang Yau Chee & Anor* [1969] 2 MLJ 194 diikut, *Wong Mun Kong v Pacific & Orient Underwriters (M) Sdn Bhd* [1978] 1 MLJ 183 dan *Yee Boon Neng v Tan Chwee* [1967] 2 MLJ 157 dibeza.]

Notes

For cases on dying declaration, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 790–804.

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 621–826.

Cases referred to

Barkway v South Wales Transport Co Ltd [1948] 2 All ER 460 (folld)
Chan Peng Fook v Kan Pak Lee [1974] 2 MLJ 197 (refd)
Chan Phuat Khoon v PP [1962] MLJ 127 (folld)
Lim Ah Toh v Ang Yau Chee & Anor [1969] 2 MLJ 194 (folld)
Mary Shim v PP [1962] MLJ 132 (refd)
Mohamed bin Allapitchay & Ors v R [1958] MLJ 197 (folld)
Nembhard v R [1982] 1 All ER 183 (refd)
Pakala Narayana Swami v King-Emperor [1939] MLJ 59 (folld)
R v Na Thu (1902) 10 SSLR CA (refd)
Toh Lai Heng v R [1961] MLJ 53 (folld)
Wong Mun Kong v Pacific & Orient Underwriters (M) Sdn Bhd [1978] 1 MLJ 183 (distd)
Yap Yew Yee v Subramaniam & Anor [1972] 2 MLJ 53 (refd)
Yee Boon Neng v Tan Chwee [1967] 2 MLJ 157 (distd)

Legislation referred to A

Civil Law Act 1956 s 7
Evidence Act 1950 s 32(1)(a)
Evidence Ordinance 1950 s 32
Evidence Act 1872 s 32(1) [India]
Penal Code (FMS Cap 45) s 314 B

Tan Hock Kim (*Tan & Tan*) for the plaintiffs.
Teo Say Eng (Senior Federal Counsel) (State Legal Adviser's Chambers, Johor Bahru) for the defendants.

Abdul Malik Ishak J: The first plaintiff is the widow of Loh Keng Yuen C ('the first deceased') and she brings this action for the benefit of herself and three dependant children under s 7 of the Civil Law Act 1956 ('the Act'), while the second plaintiff is the widow of Lok Park Hong ('the second deceased') and she brings this action for the benefit of herself as dependant under s 7 of the Act. The third plaintiff, on the other hand, is D the widow of Tho Chin ('the third deceased') and she brings this action for the benefit of herself as dependant under s 7 of the Act.

It is undisputed that the accident occurred on 20 October 1987 at about 2pm during heavy rain at or near a bend at 11½ milestone, along the stretch of Jalan Kota Tinggi-Johor Bahru between a station wagon JAD 7305 E driven by the first deceased with the second and third deceased persons as passengers and a motor-lorry WM 6686 driven by the first defendant.

As usual in a running down case, there are two conflicting versions of how the accident took place. The plaintiff's case is that the second deceased as the front passenger of the station wagon gave a statement before his death while being warded in the Hospital Sultanah Aminah, Johor Bahru, F to his son ('PW1') to the effect that on their way to Ulu Tiram, a motor-lorry had collided into the station wagon in which he was travelling from the rear and he felt that the station wagon was pushed for a long distance before both the vehicles came to an abrupt stop. It seemed that the third deceased was seated in the rear seat of the station wagon alone at the G material time. The defendants' version of the accident is that while the motor-lorry was negotiating a left-hand bend at 11½ milestone along the stretch of Jalan Kota Tinggi-Johor Bahru in the direction of Kota Tinggi from Johor Bahru, a Toyota station wagon driven by the first deceased from the direction of Kota Tinggi towards Johor Bahru (meaning from the opposite direction) suddenly skidded in heavy rain across the said road H when it was about 30 feet in front of the motor-lorry. The station wagon was said to turn twice as it encroached into the path of the motor-lorry and then that station wagon turned in the direction of Kota Tinggi, thereby causing the rear of that station wagon to collide with the front portion of the motor-lorry. It is the defendant's version that that collision took place I on the motor-lorry's correct path of the road and at the material time, it was raining very heavily. It is apparent that the positions of the two vehicles after the collision are as reflected in the several photographs tendered in court in the course of the trial. It is also apparent that if the

A defendant's version of how the accident took place is true, then they are totally absolved from liability, and the question of contributory negligence would not arise and further, the plaintiffs' claim must be dismissed while the defendant's counterclaim would be allowed. The onus is therefore on the plaintiffs to prove negligence against the defendants.

B The plaintiffs' version is based on the so-called dying declaration of the second deceased which was sought to be admitted under s 32(1)(a) of the Evidence Act 1950. Can the plaintiffs succeed? For this exercise, several authorities need to be examined.

Mary Shim v PP [1962] MLJ 132 (CA) was a case of causing C miscarriage under s 314 of the Penal Code (FMS Cap 45), where the statements of the deceased to two personalities were admitted by the learned trial judge under s 32 of the Evidence Ordinance 1950 and the decision was upheld by the Court of Appeal. In that case, the deceased gave statements to: (a) Dr Lily Tan to the effect that:

D > She was two months' pregnant. On 6 June 1960, she told me that she went to a private midwife and asked her to procure an abortion. This was performed upon her. She did not name the midwife to me.

and (b) her husband, by the name of Lim Cheng Fatt, to the effect that:

E > The husband told of visits to the appellant after his wife became ill and stated that pills were supplied by the appellant. He also stated that the deceased told him that she had gone to the appellant's house for an abortion and that the appellant had introduced a piece of stick into her womb. He stated that the deceased had eventually removed this stick herself from her body and that he had kept it and given it to Dr Tan.

F It is pertinent to point out that in *Mary Shim*, apart from the statements made to those two personalities, the deceased had also made a statement, before she died, to the magistrate in the hospital. This is clearly seen from the judgment of Hill JA at p 134 of the report. His Lordship, speaking for the Court of Appeal, had this to say:

G > In addition to the statements made to her husband, the deceased had given the history of her illness to Dr Tan and before she died made a statement to a magistrate in the hospital. This statement was strongly criticized by Mr Marshall and chiefly on the ground that it did not contain the *ipsissima verba* of the deceased. The magistrate gave evidence a year or so after recording this statement and his recollection with regard to questions he H may have put was impaired, but there seems no reason for thinking that he did not record correctly the actual words of the deceased. In any event, the statements by the deceased to Dr Tan and the magistrate were clearly admissible in our opinion in accordance with s 32 of the Evidence Ordinance.
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> Finally, there remains the question of corroboration of the deceased's statement, or dying declaration, to the magistrate and to Dr Tan. Clearly, I the deceased was an accomplice to the criminal act of abortion and, as such, corroboration of her evidence was desirable and necessary, though the urgency of the need for corroboration was not great in the circumstances present in this case. The learned trial judge considered the question of corroboration and found it, among other things, in the visits to the appellant.

In *Pakala Narayana Swami v King-Emperor* [1939] MLJ 59, the facts were that on 23 March 1937, the body of a deceased Indian by the name of Kurree Nukaraju was found in a steel trunk in a third class compartment at Puri, the terminal of a branch line in the Bengal Nagpur railway, where the trunk had been left unclaimed. The body had been cut into seven portions and the medical evidence left no room for doubt that the deceased had been murdered. Police suspicion fell on the accused and his household, and during the investigation held in his house, the accused made a statement to the police that the deceased had come to his house on 21 March 1937, slept in one of the outhouse rooms for the night, and left on the evening of 22 March by a passenger train. The alleged statement, objected to by the defence, was admitted by the courts below. Apart from this statement, there was ample other evidence that a trunk had been bought by order of the accused and taken to his house on 22 March, and that on 23 March, that trunk, containing the body of the deceased, was placed on a train at the station of Berhampur, having been conveyed there in a vehicle ordered by the accused, in which he and the trunk travelled to the station. The widow of the deceased also made a statement that on 20 March, the deceased had told her that he was going to Berhampur, as the accused's wife had written and told him to go and receive payment of his dues. The appellant was charged with and convicted of murder and sentenced to death by the sessions judge at Berhampur. On appeal, the High Court of Patna upheld the conviction. The appellant appealed to the Privy Council by special leave. The Privy Council dismissed the appeal and upheld the conviction. On the reception of evidence under s 32(1) of the Indian Evidence Act 1872, Lord Atkin made the following observations (at p 61):

> A variety of questions as to the effect of this section has been mooted in the Indian courts. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, and that the 'circumstances' can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to expect to be killed. The circumstances must be circumstances of the transaction. General expressions indicating fear or suspicion, whether of a particular individual or otherwise, and not directly related to the occasion of the death, will not be admissible. However, statements made by the deceased that he was proceeding to the spot where he was in fact killed or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him, would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. 'Circumstances of the transaction' is a phrase, no doubt, that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence', which includes evidence of all relevant facts. It is, on the other hand, narrower than *res gestae*. Circumstances must have some proximate relation to the actual occurrence, though as, for instance, in a case of prolonged poisoning — they may be related to dates at a considerable distance from the date of the actual fatal dose.

A It will be observed that 'the circumstances' are those of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that 'the cause of (the declarant's) death comes into question'.

B In *Nembhard v R* [1982] 1 All ER 183 (PC), the facts were that the appellant was charged in Jamaica with the murder of a police officer. The evidence for the prosecution was that the deceased had been shot at the gate of his home and that there were no eye witnesses, but that when his wife heard the shots and ran out to him from the house, he told her that he was going to die, that she was going to lose her husband and that the C appellant had shot him. He died a few hours later. The trial judge admitted the evidence of the wife as to her husband's statement on the basis that it was a dying declaration. There was no other evidence which implicated the appellant. In his summing up, the trial judge told the jury that they must be satisfied as to the reliability of the wife and that, if so satisfied, they must also assess the probative value of the dying declaration itself, bearing D in mind that it had not been tested by cross-examination, but he did not tell the jury that it was dangerous to rely on a dying declaration in the absence of corroboration. The appellant was convicted and his application for leave to appeal against conviction was dismissed by the Court of Appeal of Jamaica. The appellant appealed to the Privy Council, contending E that the jury should have been directed that it was dangerous to convict of murder solely on the evidence of a dying declaration with no supporting or corroborating evidence and that, no such direction having been given, the appellant's conviction was unsafe and should be quashed. The Privy Council held that there was no rule of law or practice whereby a special warning about the absence of corroborative evidence had to be given F where the only evidence implicating the accused consisted of a dying declaration. A trial judge had a general duty to leave the jury with a clear consciousness of the need for care in assessing the significance of a dying declaration, and in the appellant's case that duty had been discharged by the trial judge in his summing up. Sir Owen Woodhouse, who wrote the G decision of the Privy Council, had this to say on dying declaration (at p 185):

> It is not difficult to understand why dying declarations are admitted in evidence at a trial for murder or manslaughter and as a striking exception to the general rule against hearsay. For example, any sanction of the oath in H the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. So it is considered quite unlikely that a deliberate untruth would be told, let alone a false accusation of homicide, by a man who believed that he was face to face with his own impending death. There is the further consideration that it is important in the interests of justice that I a person implicated in a killing should be obliged to meet in court the dying accusation of the victim, always provided that fair and proper precautions have been associated with the admission of the evidence and its subsequent assessment by the jury. In that regard, it will always be necessary for the jury to scrutinize with care the necessarily hearsay evidence of what the deceased

was alleged to have said both because they have the problem of deciding whether the deponent who has provided the evidence can be relied on and also because they will have been denied the opportunity of forming a direct impression against the test of cross-examination of the deceased's own reliability.

In another part of his judgment, his Lordship Sir Owen Woodhouse spoke of whether the need for care in assessing the significance of a dying declaration requires that a jury should be specifically directed that it would be dangerous to convict on that evidence in the absence of corroboration. This was how his Lordship tackled the issue (at pp 186–187):

> It appears that a rule of practice has been developed that when a dying declaration has been the only evidence implicating an accused person, a conviction usually cannot be allowed to stand where there had been a failure to give a warning on the necessity for corroboration: see for example *Pius Jasunga s/o Akumu v R* (1954) 21 EACA 331 and *Terikabi v Uganda* (1975) EA 60. But it is important to notice that in the countries concerned, the admissibility of a dying declaration does not depend on the common law test, that is on the deceased having at the time a settled hopeless expectation of impending death. Instead, there is the very different statutory provision contained in s 32(1) of the Indian Evidence Act 1872. That section provides that statements of relevant facts made by a person who is dead are themselves relevant facts:
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> > 'When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant *whether the person who made them was or was not, at the time when they were made, under expectation of death*, and whatever may be the nature of the proceeding in which the cause of his death comes into question.' (Emphasis added.)
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> In *Akumu,* it was pointed out (for the reason associated with the emphasized words in the subsection) that the weight to be attached to a dying declaration admitted by reference to s 32 of the Indian Evidence Act would necessarily be less than that attached to a dying declaration admitted under the common law rules. The first kind of statement would lack that special quality that is thought to surround a declaration made by a dying man who was conscious of his condition and who had given up all hope of survival. Accordingly, it may not seem surprising that the courts dealing with such statements have felt the need to exercise even more caution in the use to be made of them than is the case where the common law test is applied.

On the subject of dying declaration, textbook writers have this to say.

Phipson on Evidence (13th Ed) at p 345 was of the view that at common law:

> ... cases recognizing that where a witness is dead, it may be better to admit evidence of what he said than to deprive the court of all proof.

Sarkar's Law of Evidence, vol 1, at p 567 contains interesting passages that merit reproduction in verbatim and they are reproduced hereinunder:

> A dying declaration is admissible in this country in civil suits under the terms 'whatever may be the nature of the proceeding in which the cause of

death comes into question'. Thus, in a suit for damages for death caused by a railway accident due to the negligence of the company, the declaration of the passenger killed, as to the cause of his death is admissible. Illustration (a) shows that it is receivable in civil as well as in criminal cases.

These are the principle points of distinction between English and Indian laws. Therefore, English authorities should be very cautiously referred to in deciding cases. A dying declaration under the Act assumes a character very widely different from what it is under the English law, as it is relevant under it whether the person who made it was or was not, at the time when it was made, under expectation of death (*R v Premananda* 52 C 987; 29 CWN 738, *R v Digambar* 19 WR Cr 44. In *R v Bisso Ranjan* 6 WR Cr 75 (decided under s 29 of Act 2 of 1855 and s 371 of Act 75 of 1861), it was held that the rule of English law restricting the admissibility of dying declarations to cases of homicide had no application in India). The nature of proceeding in which the cause of death comes into question need not necessarily be a charge of murder or homicide. It may be a charge of a different nature or it may be a civil action (*Parmanand v R* [1941] Nag 110; AIR 1941 Nag 340, *Lalji v R* 6 P 747).

Statute-wise, s 32(1) of the Act specifies certain conditions which must be satisfied before statements made by persons who cannot be called as witnesses are permitted. One of such conditions is that the maker of the statement is dead. Section 32(1)(a) of the Act provides that statements made by a person as to the cause of his death or circumstances of the transaction which resulted in his death are admissible if relevant. This section varies from the common law version in two material respects. Firstly, it is not confined to cases where the defendant is charged with the murder or unlawful killing of the declarant. Secondly, it does not require that the statement be made 'under expectation of death' (*R v Na Thu* (1902) 10 SSLR (CA)). It is a correct statement of the law that in a civil suit for damages for death caused by a road accident due to the negligence of the defendant, the declaration of the passenger killed 'as to the cause of his death' is admissible. But to qualify as a dying declaration, that statement must first and foremost satisfy two strict conditions, namely:

(a) It must relate to either of two matters: (i) the cause of death; or (ii) the circumstances of the transaction which resulted in the death. It is my judgment that the phrase 'circumstances of the transaction' should not be accorded an unneccesarily wide construction for to do so would lead to hearsay being too readily admitted. Lord Atkin in *Pakala Narayana Swami v King-Emperor* correctly construed that the circumstances must have some proximate relation to the actual occurrence. The transaction must relate to a set of facts pertaining to the death of the victim. It would usually relate to the time or place of his death or about meeting someone who may be the accused (see the cases in the early part of this judgment). Thus, in so far as this case is concerned, it is my judgment that that part of the second deceased's statement relating to the time, place of his death and the cause of his death would satisfy the first condition.

(b) That the statement must not be in a summary form. Bluntly put, the statement, no matter how short, must not be summarized by anyone,

but must be given word for word as given by that dying person. Verbatim reproduction of the declarant's dying words must be given. In *Toh Lai Heng v R* [1961] MLJ 53, the prosecution witness who was called to prove the relevant deposition testified that he reduced into writing briefly the substance of the dying declaration. The deceased and the witness conversed in Malay, which was not the mother tongue of either, and the conversation was recorded in English. It was held that the omission to record the actual words of the deceased was a fatal defect. Rose CJ, delivering the judgment of the Court of Criminal Appeal, observed in trenchant terms that (at pp 53–54):

> It is no doubt true that a dying declaration need not be proved by writing at all; and there are many cases where eye witnesses at the scene of an attack, or persons arriving shortly thereafter, may hear the last words spoken by a dying man and their recollection of those words will properly be received in evidence. In practice, of course, such a witness would be required to give the exact words spoken by the deceased and, in so far as they are relevant, any words spoken to the deceased by the witness himself.
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> If, however, the dying declaration is reduced to writing — and this would invariably be the case in the event of the witness in question being an investigating police officer, magistrate or someone of that kind — the actual words of the deceased must be recorded.
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> The principle underlying this rule was explained by Cave J in *R v Mitchell* (1892) 17 Cox CC 503. The reason for the rule is clear, namely, that if the deceased's statement is taken down in narrative form, that amounts in effect to the witness himself drawing inferences and, perhaps, filling gaps in the deceased's statement, which are properly matters within the province of the judge and jury. It is for them to draw any necessary inferences from the actual words of the deceased and not for the witness who heard the words spoken.
>
> In *R v Bottomley* (1903) 38 LJ Newsp 311, the question arose as to whether Cave J intended to rule that in every case questions as well as answers must be recorded, and Lawrence J held that a dying declaration in the form of question and answer was admissible although the answers only and not the questions had been recorded.

Now, several observations can be made in regard to the statement of the second deceased to PW1. Firstly, PW1 did not write down what his deceased father told him about seven to eight years ago. Secondly, that statement was given in a narrative form by PW1. Thirdly, each time PW1 was required to repeat what his late father had told him, he would recite a different version. In his examination-in-chief, PW1 told the court that:

> Semasa kereta yang ditumpangi oleh bapa saya tiba di Ulu Tiram, sebuah lori daripada belakang kereta telah melanggar kereta mereka dengan kuat. Dan mengikut bapa saya, dia kata dia rasa kereta mereka telah ditolak dengan satu jarak yang jauh sebelum kedua-dua kenderaan berhenti.
>
> Bapa saya beritahu saya bahawa adik saya Loh Keng Yuen yang memandu station wagon itu.

Under cross-examination, PW1 testified that:

> Pada malam tersebut, bapa saya memberitahu saya bahawa sebelum mereka sampai di Ulu Tiram dalam perjalanan tersebut, sebuah lori dari belakang telah melanggar station wagon yang ditumpang oleh bapa saya dan bapa saya juga berkata beliau tidak tahu mengapa lori dari belakang boleh langgar station wagon mereka.

Fourthly, PW1 summarized what his late father had told him. Fifthly, PW1 testified that his late father talked to him for half an hour on the second night — yet, so little was adduced before this court. It is my judgment that the summarized version as narrated by PW1 of what his late father had told him runs counter to the second condition and consequently, the dying declaration ought not to be received as evidence.

Assuming, for a moment, that the dying declaration has satisfied both the two conditions as specified above and that the second deceased's statement is admissible, it is imperative on the court's part to heed the warning of Whyatt CJ in *Mohamed bin Allapitchay & Ors v R* [1958] MLJ 197 to the effect that if the statement was admitted as a dying declaration, the jury should have been warned that the statement was not made on oath and subjected to cross-examination, and as this was not done, it amounted to a serious misdirection. I must therefore take stock of the situation, bearing in mind that the dying declaration of the deceased was not made on oath and the declarant was not available for cross-examination. It is here that this court must assess the credibility of the second deceased before relying on his statement made to PW1. In *Chan Phuat Khoon v PP* [1962] MLJ 127, Thomson CJ — speaking for the Court of Appeal — said that as the dying declaration was 'the voice of the woman speaking from beyond the grave', the trial judge 'did not apply his mind to the vital issue in the case, which was: did that voice from beyond the grave speak the truth? Was it to be relied upon?' Here, the second deceased purportedly told his son that a motor-lorry knocked their station wagon from behind. This immediately brings to mind the following salient questions: did the second deceased actually see the motor-lorry coming from behind since he was only a front passenger seated next to the driver and, at the material time, it was raining heavily? Was the second deceased a good observer? Obviously, these salient questions remain unanswered till today.

Next, I shall now examine the credibility of PW1. Initially, PW1 told the court that his late father told him how the accident had happened on the first night of admission to the Hospital Sultanah Aminah, Johor Bahru. PW1 decided to change his version under cross-examination where he stated that in actual fact, on the first night of admission to the said hospital, his late father did talk to him for one minute but did not touch on the accident. PW1 elaborated further that on that first night, his late father could talk to him although he was breathing on an oxygen ventilator and was on a drip. That was certainly an attempt to spice up the story. It is highly improbable that a patient who was seriously injured and who was on an oxygen ventilator and on a drip could ever talk at all. I venture to say that even if the second deceased desired to talk on that first night, the

hospital authorities would not have allowed him to do so. One must not lose sight of the fact that PW1 testified as to what had happened some seven or eight years ago. PW1 did not keep a written record and the adage 'a faint ink is better than a good memory' rings true in this case. As against the purported dying declaration, two eye witnesses testified as to how the accident took place. These two eye witnesses narrated the story as to how the accident took place in vivid terms. Now, again assuming that the accident occurred in the manner as described by the second deceased to his son, it would be highly improbable that both the vehicles could have been stucked together after the impact. It is my judgment that if the station wagon had been knocked from behind by the bulky motor-lorry, it would have been flung far away. The facts that both the vehicles were stuck to each other after the collision and the extensive damage sustained by the station wagon lend support to the defendants' version that the two vehicles were travelling in the opposite direction when the accident took place as two forces coming in opposite direction would only result in two objects being stuck together.

It is now appropriate to appraise the defendant's version. Through the two eye witnesses, the defendants have established that:

(1) The station wagon was travelling fast while negotiating a right-hand bend facing the direction of Johor Bahru.

(2) It was raining heavily and the road surface was very wet. This spells danger.

(3) On that stretch of Jalan Kota Tinggi-Johor Bahru, at the material time, there was no other traffic apart from the station wagon and the motor-lorry.

(4) The station wagon, while negotiating the right-hand bend, had suddenly skidded when it was about 30 feet from the motor-lorry thereby causing the station wagon to spin twice and it then encroached into the path of the motor-lorry with its back portion facing the front of the motor-lorry. This occurred suddenly and the distance was too close for the first defendant to take any evasive measures. The first defendant testified that under such extreme circumstances, he immediately applied his brakes, but because of the wet condition of the road the motor-lorry, which was carrying a load, still moved forward. As a result, the back portion of the station wagon collided into the front portion of the motor-lorry.

(5) The collision took place on the rightful path of the motor-lorry.

(6) The positions of both vehicles after that collision are as reflected in the photographs.

It is my judgment, and I hold as a solid finding of facts, that the station wagon was speeding, that the station wagon skidded as it negotiated a right bend, that the station wagon spun twice and went to the wrong side of the road — into the lawful path of the motor-lorry, that the back portion of the station wagon collided with the front portion of the motor-lorry. All these facts raised a presumption of negligence against the driver of the station

A wagon, namely, the first deceased and it is for the plaintiffs to prove affirmatively that they had exercised all reasonable care (*Barkway v South Wales Transport Co Ltd* [1948] 2 All ER 460 and *Lim Ah Toh v Ang Yau Chee & Anor* [1969] 2 MLJ 194).

Next, I will now consider whether the first defendant as the driver of
B the motor-lorry was guilty of contributory negligence. For fear of repetition and because of the stand taken by me in regard to the issue of dying declaration, I need to briefly state the following:

(1) Although it was raining heavily when the accident occurred, the first defendant testified that visibility was good and this point was confirmed
C by DW2.

(2) The collision took place on the lawful/rightful path of the motor-lorry.

(3) The first defendant was negotiating a left-hand bend — a long and gradual bend and he did not at any time encroach into the path of the
D oncoming station wagon.

(4) Before the collision, the station wagon was travelling from the opposite direction of the motor-lorry.

(5) The first defendant drove the motor-lorry at a speed of 35km/per hour (21.7mph) on a rainy day. That was indeed a very low speed
E bearing in mind that:

(a) there was no traffic on the road;

(b) no speed limit; and

(c) no traffic signs to warn motorists of any impending danger.

F On the question of what is a reasonable speed on a rainy day and travelling on a highway, I am reminded of what Mohd Azmi J (as he then was) said in *Yap Yew Yee v Subramaniam & Anor* [1972] 2 MLJ 53, especially at p 54. This was what his Lordship said:

> To my mind, driving at 2.15pm on a highway at 30–35mph on an ordinary
G rainy day does not amount to speeding especially where there is no traffic on the road and no speed limit or other traffic signs to warn motorists of any possible danger ahead.

The first defendant testified that while driving, he was concentrating to the view that was ahead of him and at the same time he was engaged in a casual conversation with the other passengers in the motor-lorry. It was
H argued, as a leverage, to the effect that that casual conversation affected the concentration of the first defendant and this was said to be the extent of his contributory negligence. With respect, I see no merit to this argument. Attempts were made to impress upon me that the first defendant must be held 25% liable on the authorities of *Wong Mun Kong v Pacific & Orient*
I *Underwriters (M) Sdn Bhd* [1978] 1 MLJ 183 and *Yee Boon Neng v Tan Chwee* [1967] 2 MLJ 157. In *Wong Mun Kong*'s case, the plaintiff was a 19-year old student at the time of the accident and he was riding a motorcycle when he foolishly made a U-turn which resulted in a collision with a motor car. The plaintiff was held 75% negligent and the driver of that motor

car 25%. In *Yee Boon Heng*'s case, two lorries approached each other from the opposite directions at a bend along the stretch of the road. The defendant's lorry off side tyre mark was found on the plaintiff's half of the road. The plaintiff was nevertheless held to be 25% liable. On the facts, these two authorities are poles apart from the facts of the present case. I am aware that 'a motor car has now become a lethal weapon and the standard of skill and care which the law demands from the driver is very high' (per Hashim Yeop A Sani J (as he then was) in *Chan Peng Fook v Kan Pak Lee* [1974] 2 MLJ 197) and the same standard should be applied here, and it is my judgment that the first defendant here passed that stringent requirement with flying colours.

For these reasons, I dismissed the plaintiffs' claim with costs. I allowed the defendants' counterclaim with costs.

On quantum, the parties have agreed to damages as follows:

The first plaintiff		
(a) Loss of dependency	.....	RM39,000
(b) Bereavement	.....	RM10,000
(c) Vehicle damage	.....	RM 4,200
(d) Funeral expenses	.....	RM 3,500
The second plaintiff		
(a) Bereavement	.....	RM10,000
(b) Funeral expenses	.....	RM 3,500
(c) Hospital expenses	.....	RM 163
The third plaintiff		
(a) Bereavement	.....	RM10,000
(b) Funeral expenses	.....	RM 3,500

The defendants' counterclaim against the first plaintiff was agreed at RM2,100.

The usual rates of interest at 8% pa for general damages from the date of service of the writ to the date of judgment and 4% pa for the others to run from the date of accident to the date of judgment were ordered.

Plaintiffs' claim dismissed.

Reported by Jafisah Jaafar